

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY BETH HARSHBARGER,	:	CIVIL ACTION
	:	
PETITIONER	:	
	:	
VS.	:	
	:	
MICHAEL R. REGAN, UNITED STATES	:	
MARSHALL FOR THE MIDDLE DISTRICT OF	:	
PENNSYLVANIA; ERIC HOLDER,	:	
ATTORNEY GENERAL OF THE UNITED	:	
STATES; SUSAN TORRES, ATTORNEY-	:	
ADVISOR, OFFICE OF THE LEGAL	:	
ADVISOR, UNITED STATES DEPARTMENT	:	
OF STATE; HILLARY RODHAM CLINTON,	:	
SECRETARY OF STATE OF THE UNITED	:	
STATES,	:	
RESPONDENTS	:	NO.: *****

EMERGENCY PETITION FOR WRIT OF HABEAS
CORPUS PURSUANT TO 28 U.S.C. §§2241 AND 2243
AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

AND NOW, comes the Petitioner, Mary Beth Harshbarger, by and through counsel, PAUL P. ACKOUREY, ESQUIRE, and respectfully petitions this Honorable Court for a writ of habeas corpus pursuant to §§2241 and 2243 and such declaratory and injunctive relief as to remedy the prospective and unlawful detention of her person now called for by the extradition magistrate's Certification of Extraditability and Order of Commitment, issued on March 4, 2009, as amended by its Order of March 12, 2009, and to enjoin the Respondents from further violating her constitutionally guaranteed

liberty rights by extraditing her to Canada. In support thereof, it is averred as follows:

CUSTODY

1. Pursuant to a Certification of Extraditability and Order of Commitment issued on March 4, 2009 by United States Magistrate Malachy E. Mannion, presiding as extradition magistrate in In the Matter of the Extradition of Mary Beth Harshbarger (hereinafter "In Re Extradition of Harshbarger"), Crim. No. 5:08-MJ-00109, within the United States District Court for the Middle District of Pennsylvania, Mary Beth Harshbarger was ordered to be committed to the custody of the United States Marshal on Friday, March 13, 2009, "pending disposition of this matter by the Secretary of State and the arrival of agents from Canada, at which time, Mary Beth Harshbarger will be transferred to the custody of the agents from Canada at such time and place as mutually agreed upon by the United States Marshal and the duly authorized representatives of the Government of Canada to be transported to Canada, unless such custody, commitment, or transfer is vacated or stayed by Court Order." Denying a requested stay of the certification of extraditability, the extradition magistrate did, however, grant a short continuance of Ms. Harshbarger's surrender date until March 20, 2009, to allow her time to re-file a motion for stay and an appropriate petition for a writ of habeas corpus. See Memorandum and Order of March 12, 2009 filed in In re Extradition of Harshbarger.

JURISDICTION AND VENUE

2. This action arises under the Constitution of the United States, the Treaty on Extradition, December 3, 1971, U.S. - Canada, T.I.A.S. No. 8237 (as amended by the protocols of January 11m 1988, 1988 U.S.T. LEXIS 182 and January 12, 2001,

2001 U.S.T. LEXIS 92, 2006 WL 2530939), and 18 U.S.C. §3184. This Court has jurisdiction under 28 U.S.C. §2241(c)(1) and (3) and Article I, Section 9, Clause 2 of the United States Constitution, as Ms. Harshbarger is presently subject to a certification of extraditability and order of commitment that requires her to surrender herself to the custody of the United States Marshal on or before 3:00 p.m. on March 20, 2009 unless otherwise ordered in a habeas proceeding. See Memorandum and Order of March 12, 2009 filed in In re Extradition of Harshbarger, supra.

3. Venue lies in the United States District Court for the Middle District of Pennsylvania, the judicial district in which Ms. Harshbarger resides and is subject to the order of commitment currently in effect. 28 U.S.C. §1391(e).

PARTIES

4. Petitioner Mary Beth Harshbarger is an American citizen residing within the Middle District of Pennsylvania who has been charged by Canadian authorities with violating Sections 219(1) and 220(a) of the Criminal Code of Canada (relating to criminal negligence causing the death of another, where a firearm is used during the commission of the offense). A complaint seeking extradition of Ms. Harshbarger from the United States to Canada was brought before United States Magistrate Malachy E. Mannion by the United States on behalf of the government of Canada. After extradition proceedings in this matter, the extradition magistrate issued a certification of extraditability and order of commitment, which, as amended, require Ms. Harshbarger to surrender herself to the custody of the United States Marshal on or before 3:00 p.m., Friday, March 20, 2009.

5. Respondent Michael R. Regan is the United States Marshal for

the Middle District of Pennsylvania, who, along with his agents, will assume custodianship of Ms. Harshbarger on March 20, 2009 under the order of commitment now in effect. Respondent Eric Holder is the Attorney General of the United States and is responsible for the administration of the Department of Justice and the United States Attorney's Office that has acted on behalf of the Canadian government in seeking Ms. Harshbarger's extradition. Respondent Susan Torres is an Attorney-Advisor in the Office of Legal Advisor, United States Department of State, who has issued a Declaration in the matter of Ms. Harshbarger's extradition with the diplomatic note of the Canadian Government to the State Department requesting extradition, and copies of the treaties and protocols governing United States - Canadian extradition. Respondent Hillary Rodham Clinton is the Secretary of State of the United States, to whom the applicable certification of extraditability is addressed, and is responsible for the administration of the Department of State and the implementation and enforcement of the United States - Canadian extradition treaty as it applies to Ms. Harshbarger. As such, she has ultimate custodial authority over petitioner, although Ms. Harshbarger is subject to the direct control of all the Respondents and their agents.

EXHAUSTION OF REMEDIES

6. Petitioner has exhausted her remedies to the extent required by law, and her only remedy is by way of this judicial action. Subsequent to submission of briefs by the government and Ms. Harshbarger, an evidentiary extradition hearing was held in this matter on February 13, 2009. On March 4, 2009, the extradition magistrate issued a Certification of Extraditability and Order of Commitment providing that the petitioner be committed to the United States Marshall on March 13, 2009

pending final disposition of her case by the Secretary of State. Subsequent to a motion to stay filed by the petitioner, the extradition magistrate amended only the Order of Commitment to the extent that petitioner's surrender date was continued to March 20, 2009 to allow for the refiling of a stay motion in conjunction with an appropriate filing of a petition for writ of habeas corpus in this matter.

7. An individual challenging a court's extradition order may not appeal directly, because the order does not constitute a final decision under 18 U.S.C. §1291, but may petition for a writ of habeas corpus. Haxha vs. Levi, 465 F. 3d 554, 560 (3rd Cir. 1997) citing Sidali vs. INS, 107 F. 3d 191, 195(3rd Cir. 1997).

STATEMENT OF THE FACTS

8. The Petitioner, Mary Beth Harshbarger, accompanied by her husband, Mark Harshbarger, their two children, Myra (age 4) and Elijah James (age six months), together with Mark's brother, Barry Harshbarger, traveled from Pennsylvania to the Moosehead Hunting Lodge near Buchans Junction, Newfoundland for a one week trip in September of 2006 to hunt moose, caribou, and bear. A Canadian hunting guide was employed to assist them.

9. On or about September 14, 2006, Ms. Harshbarger, believing she saw a bear coming out of the brush, fired a shot from her rifle at approximately 7:55 p.m. That shot proved to be the fatal shot that killed her husband, Mark Harshbarger, who was wearing dark clothing at the time and who had briefly become separated from the hunting guide when the latter had paused to urinate.

10. Under applicable Canadian hunting regulations, hunting is permitted until thirty (30) minutes after sunset. Sundown on the day of the fatal shot

occurred at 7:31 p.m., such that the gunshot in question was fired six (6) minutes before the legal time period expired.

11. Canadian law enforcement, after conducting two re-enactments of the incident on or about September 16, 2006 and again on or about September 13, 2007, though it "plausible" that Ms. Harshbarger felt she was shooting at a bear but ultimately concluded that she should not have taken the shot at that time of the day.

12. More than one and one-half years after the 2006 incident, on April 20, 2008, an information was sworn by Canadian Authorities charging Ms. Harshbarger with criminal negligence resulting in death and involving the use of a firearm in violation of Sections 219(1) and 220(a) of the Criminal Code of Canada and an arrest warrant was issued. Thereafter, the Canadian government contacted the State Department and requested extradition. The State Department, in turn, and acting on behalf of the Canadian government, filed for extradition proceedings more than two years after the underlying events, and long after the petitioner had apparently lawfully returned home to the United States.

13. Briefs were filed by the government and Mary Beth Harshbarger and, on February 13, 2009, an evidentiary hearing was held. On March 4, 2009, United States Magistrate Judge Malachy E. Mannion, serving as an extradition magistrate, issued a Certification of Extraditability and Order of Commitment and a corresponding Memorandum and Order, (somewhat at odds with his earlier Memorandum and Order of January 6, 2009 by which he issued a summons for Ms. Harshbarger to appear at an initial court appearance on January 16, 2009,

rather than a warrant for her arrest, and in which he questioned whether Ms. Harshbarger's actions amounted to tortious negligence, much less criminal negligence) in which he found probable cause to believe Ms. Harshbarger was grossly negligent and responsible of the criminal negligence resulting in death that Canadian authorities had charged her with. Ms. Harshbarger was ordered to surrender herself to the custody of the United States Marshal on March 13, 2009 pending further disposition by the United States Secretary of State and potential transfer to the custody of Canadian officials.

14. Subsequent to Ms. Harshbarger's motion to stay the aforementioned certification and commitment order, filed on March 9, 2009, the extradition magistrate, by Memorandum and Order of March 12, 2009, amended her surrender date to March 20, 2009 to allow for the re-filing of a motion to stay in conjunction with the filing of an appropriate petition for writ of habeas corpus.

FIRST LEGAL CLAIM FOR RELIEF
(Due Process Violation)

15. Petitioner believes and therefore avers that In re United States Extradition of Sylvester, 4:05-CR-0490, 2006 U.S. Dist. LEXIS 98131 (M.D. Pa February 14, 2006) (Jones, J.) (denying extradition, and applying Pennsylvania State Law where the United States sought the extradition of a prisoner incarcerated in Pennsylvania on behalf of the government of Canada) reconsideration denied, 2006 U.S. Dist. LEXIS 20177, 2006 WL 860 945 (M.D. Pa. March 29, 2006) (denying reconsideration sought by the government) provides the controlling law in matters like Ms. Harshbarger's, which involves the United States - Canada extradition treaty. Sylvester

held that Pennsylvania law is the law that determines what constitutes competent evidence in accordance with Article 10 (1) of the extradition treaty (i.e., "according to the laws of the place where the person sought shall be found") in establishing probable cause that the Defendant committed the subject offenses. Sylvester could not be extradited because hearsay evidence alone was presented by the government at the extradition hearing, and that was not sufficient under Pennsylvania law to establish probable cause. It is submitted that the only hearsay evidence was presented by the government at Mary Beth Harshbarger's extradition hearing as well, so that she too should have been found to be unextraditable. The finding that occurred to the contrary violates her right to due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

16. The extradition magistrate, it is submitted, mischaracterized Sylvester when he stated that Pennsylvania law was applied in that case only because the coordinate domestic crime under the dual criminality standard arose under state (Pennsylvania) law. See Memorandum and Order of March 12, 2009 at pp 5-6. He ignores the Sylvester court's interpretation of Article 10 (1) of the treaty.

SECOND LEGAL CLAIM FOR RELIEF
(Equal Protection Violation)

17. Incorporating paragraphs 15 and 16, supra, by reference, it is respectfully submitted that Ms. Harshbarger's constitutionally guaranteed equal protection rights are being violated by the prospective extradition now in place. Both Sylvester and Ms. Harshbarger have been subject to the

extradition treaty between Canada and the United States. The government presented hearsay evidence alone at the extradition hearing of both Defendants. Both Defendants were, with respect to Article 10 (1) of the treaty, found within the state of Pennsylvania. While Sylvester was found unextraditable because hearsay evidence alone was found to be insufficient under Pennsylvania law to support probable cause at his extradition hearing, Ms. Harshbarger finds herself subject to a certification of extraditability though only hearsay evidence was presented at her extradition hearing. They are similarly situated although, it is submitted, Ms. Harshbarger's alleged offense is far less heinous than the rape and kidnapping Sylvester was accused of. Such a disparity should be addressed in light of the equal protection rights that are embodied in the Fourteenth Amendment to the United States Constitution.

THIRD LEGAL CLAIM FOR RELIEF
(Due Process Violation)

18. By any standard of probable cause, it is submitted that Mary Beth Harshbarger's conduct does not amount to gross negligence, as required by the criminal negligence resulting in death, with which she is charged by Canadian authorities or the co-ordinate crimes of involuntary manslaughter. The law of both of the "contracting parties" (i.e., Canada and the United States) require "wanton or reckless disregard for human life." See 18 U.S.C. §1112(a). Acting within the parameters of Canadian law when she fired a gunshot within a half-hour after sunset having employed the assistance of a licensed Canadian hunting guide, and having her perceptions compromised by the contributing factor of her husband wearing dark clothing do not add up to "wanton and reckless disregard for human life",

it is submitted, and to find otherwise is to violate Ms. Harshbarger's due process right as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. While the inquiry may be limited in a habeas corpus proceeding reviewing a magistrate judge's extradition order under a treaty with a foreign country, it does include "whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." Sidali vs. INS, 107 F.3d 191, 195 (3rd Cir. 1997) quoting Fernandez vs. Phillips, 268 U.S. 311, 312, 45 S. Ct. 541, 542 (1925). Further, Pennsylvania law requires not only legally competent evidence, but evidence which demonstrates the existence of each of the material elements of the crime charged. Commonwealth ex rel. Buchanan vs. Verbonitz, 525 Pa 413, 417 (1990). Under the aforementioned standards, the facts of the immediate case simply do not establish probable cause. The extradition magistrate's finding to the contrary violates Ms. Harshbarger's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

FOURTH LEGAL CLAIM FOR RELIEF
(Due Process Violation)

19. Incorporating paragraph 18, supra, by reference, it is submitted that the co-ordinate criminal offense statutes, Ms. Harshbarger's extraditability has been premised on are unconstitutionally vague as applied. It is simply unreasonable to expect that she should have recognized that her action, which were permissible under Canadian hunting regulations, and even exhibited the extra care of employing a licensed Canadian hunting guide, would be deemed "wanton and reckless disregard for the value of human

life," which is a material element of the crime charged. A finding of probable cause in applying such a criminal offense statute to Ms. Harshbarger's conduct must be voided on grounds of unconstitutional vagueness, which violates her due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner, Mary Beth Harshbarger prays that this Honorable Court grant the following relief:

1. Schedule an evidentiary hearing in this matter;
2. Enjoin the Respondents from detaining Ms. Harshbarger in the future until habeas corpus review is completed;
3. Stay Ms. Harshbarger's extradition until habeas corpus review is completed;
4. Declare that the finding of probable cause that Ms. Harshbarger is guilty of such wanton and reckless disregard for the value of human life that her actions constitute criminal negligence resulting in death violates her due process and equal protection rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution;
5. Issue a writ of habeas corpus requiring that the Certification of Extraditability and Order of Commitment presently in effect against Mary Beth Harshbarger be vacated;

RESPECTFULLY SUBMITTED:

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